IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-819

EUGENE W. LANDY, et al.,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver for the Eatontown National Bank et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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STATEMENT OF THE CASE

The Federal Deposit Insurance Corporation (FDIC) is the Receiver for the Eatontown National Bank (Eatontown). Petitioners commenced this action in the District Court, both derivatively on behalf of Eatontown and as a class action on behalf of themselves as shareholders of Eatontown and all other shareholders and all other persons who purchased Eatontown stock during the period of January 1, 1967 through August 8, 1970. Following the commencement of Petitioner's action, the FDIC brought an action against the same "respondent brokers" named

by Petitioners. (See Footnote 3A to Opinion of the Court of Appeals, App. 33a)

The FDIC opposed the derivative action on the ground that the FDIC, as Receiver, was the proper party to prosecute such an action on behalf of Eatontown and Petitioners' action was improper and premature. That position was sustained by the Third Circuit Court of Appeals and, at page 11 of the Petition for Certiorari, Petitioners state that:

> "Petitioners do not seek certiorari insofar as the court below affirmed the dismissal of the derivative causes of action . . ."

Since the FDIC is not a Defendant in the class action portion of Petitioners' action, the FDIC is not directly involved in the Questions Presented by Petitioners. However, since the FDIC has brought an action against the same "respondent brokers" named by Petitioners in their class action, insofar as Petitioners purport to represent all shareholders of Eatontown National Bank as a class, the FDIC objects to the prosecution of the action and supports the action taken by the District Court, as affirmed by the Third Circuit Court of Appeals, in dismissing Petitioners' class action.

Reason for Denying the Writ

Because the FDIC's role in this action is a limited one, it will leave the argument on the Questions Presented to counsel for the "respondent brokers". However, the FDIC wants to insure that its role as Receiver in protecting shareholders, as well as depositors and creditors of insolvent insured banks, is not derogated by Petitioners' action.

As pointed out in the District Court opinion herein:

> "The primary objective of the FDIC is to marshal funds for distribution, a goal which would include protection of the shareholders. 12 U.S.C., Sec. 192; see also, 12 U.S.C., Sec. 197." (App. 15A)

The exclusiveness of the control of a Receiver for a national bank, such as the FDIC, to protect the interest of shareholders, as well as creditors and depositors, has long been recognized. In the case of *Hulse v. Argetsinger*, 12 F.2d 933 (W.D. N.Y. 1926) the Receiver sought to settle certain claims against the directors of the insolvent bank, although the stockholders had brought separate actions against the directors. In overruling the stockholders' objection to the settlement, the Court stated:

> "Inasmuch as the rights of shareholders of a national bank are merged in the receivership, they must yield to his sound discretion and judgment." 12 F.2d at 935.

This view as to the exclusive control of a receiver for national banks has been recognized by other courts. *Lucking v. Delano*, 129 F.2d 283 (6th Cir. 1942); *Grindley v. First National Bank of Detroit*, 87 F.2d 110 (6th Cir. 1936); *O'Connor v. Rhodes*, 79 F.2d 146 (D.C. Cir. 1935); *Port Newark National Bank of Newark v. Waldron*, 46 F.2d 296 (3rd Cir. 1930); *Liberty National Bank* v. *McIntosh*, 16 F.2d 906 (4th Cir. 1927).

The damages sought by Petitioners in their action duplicate the damages sought by the FDIC in its action against virtually the same defendants, and Petitioners' attempted action serves only to interfere with the action brought

by the FDIC. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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